IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.89 OF 1993.

Ramesh Shantilal Goradiya : Appellant.

versus

Bank of India & Anr. : Respondents.

Mr.A.A.Kumbhakoni for the appellant.

None for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 12th January 2005.

ORAL ORDER

1. Heard advocate for the appellant. Nobody is present for the respondents, though they were duly served and vakalatnama is filed by respondent No.1. The appellant was the guarantor for the loan which the Respondent No.2 took from Respondent No.1-bank for purchasing a truck in 1982. It was the loan of Rs.1,50,000/- disbursed to Respondent No.2 on 12th November 1982 and it

was this loan for which the present appellant stood guarantor for Respondent No.2. Further and additional loan of Rs.10,000/- was given to Respondent No.2 by the said Bank on 21.6.1984.

2. On 31.3.1986 the truck met with an accident and was completely burnt and destroyed. The loan amount was to be repaid by Respondent No.2 to the bank in 60 equal monthly instalments. He did not pay the instalments. Therefore, the bank filed a suit on 23.8.1985. The truck was met with an accident and was burnt during pendency of the suit.

3. It is the contention of the counsel for the appellant that firstly when the truck was burnt to the ashes during pendency of the suit, it was necessary and obligatory upon the bank to give intimation of the same to the present appellant. But that was not done. Secondly, when the truck was burnt, the owner - Respondent No.2 accepted from the Insurance Company a meagre amount of Rs.50,000/- without any protest and paid the said amount to the bank and, none of these facts were intimated or informed to the present appellant. My attention was drawn by the

counsel for the appellant to the evidence of D.W.2 Vishwanath Paraswar who was the Asstt. Divisional Manager Oriental Insurance Company, Solapur. He has stated that in this case the loss caused to the truck because of the accident was taken into aggregate of cash losses where the Insurance company takes the estimate of the loss to the vehicle from the garage and then pays that amount to the owner of the vehicle in lumpsum in full discharge of the insurance policy or claim. Thereafter D.W.2 has stated that the owner of the truck i.e. Respondent No.2 had estimated the loss at Rs.2,80,075/-. The amount of Rs.50,000/- as cash loss was offered and the owner accepted the same. He has also stated that surveyor of the insurance company had estimated the loss to the tune of Rs.67,000/- and the market value of the truck was estimated by the said surveyor at that time at Rs.95,000/-. He also stated that after paying the amount of Rs.50,000/- to Respondent No.2, which in turn, were paid to the bank, a discharge certificate was obtained from both Respondent No.2 and the bank. The said certificate was produced by him.

4. My attention was also drawn by the

counsel for the appellant to the evidence of P.W.1 Pandharinath Kulkarni and particularly para 5 of his cross examination wherein this witness for the bank has stated that on 31st March 1986 truck was burnt and destroyed; that the truck was insured and the truck was suffered damages to the tune of Rs.300000/-. This witness also stated that the bank has accepted Rs.50,000/- from Oriental Insurance Company and it was adjusted against the account of defendant No.1. He also admitted that the bank did not make representation to the insurance company about the compensation being meagre. This witness has been in service of the bank since 1958 and was looking after the proposals of advancing loans for purchasing vehicles like truck. He was also the Bank Manager. However, in his cross examination this witness admitted that defendant No.2 i.e. the present appellant, was not informed about the insurance amount and settlement. Admittedly, when Respondent No.2 took loan from the bank the truck stood hypothecated to the bank and, insurance was therefore compulsory. Accordingly the truck was insured with the Oriental Insurance Company and till the amount was fully repaid it was contractual obligation upon the bank to keep

the insurance policy alive by paying premium regularly.

5. In these circumstances, therefore, it is clear that even though according to the bank the truck suffered total loss of Rs.3,00,000/- due to accident, they accepted paltry sum of Rs.50,000/- from the insurance company and issued discharge certificate in favour of the insurance company. Respondent No.2, who was the party to this, also accepted Rs.50,000/- and signed the discharge certificate and, it was this amount of Rs.50,000/- which was paid by the insurance company to the bank directly towards the account of respondent No.2. This is therefore a case where there is total variation regarding the agreement with the present appellant as guarantor by the bank and the respondent No.2. Though there is no evidence on record to show that it was fraudulent collusion between the bank and respondent No.2, the fact remains that when the accident to the truck took place during pendency of the suit, the appellant was not informed about the total destruction of the truck. Further the appellant was not informed either by the bank or

by the respondent No.2 about the estimate of loss made by the insurance company. Thirdly, the appellant was not informed either by the respondent No.1 bank or by the Respondent No.2 about acceptance of Rs.50,000/- towards full settlement and towards discharge of entire liability of the insurance company. In fact, it was contractual obligation of the respondent No.1 bank because of the agreement of guarantee to inform the appellant about any change or variation or any action of theirs which would have resulted in change or in variation of terms. When from the evidence of D.W.2 it become clear that the market value, even according to the insurance company, at the relevant time was Rs.95,000/- and, the loss, according to the surveyor, was Rs.67,000/-, the bank ought to have protested before accepting the amount of Rs.50,000/-. According to P.W.1 the loss caused to the truck was to the tune of Rs.3,00,000/- and, according to the surveyor of the insurance company it was only for Rs.67,000/-. It is, therefore, clear that the banks, which are otherwise very diligent, particularly this bank, was totally recklessly negligent in not confronting the surveyor of the insurance company

about his report and estimate of loss of Rs.67,000/- as against bank's estimate of Rs.3,00,000/-. Secondly, the bank ought to have informed the appellant about the change in circumstances and their acceptance of Rs.50,000/- towards full satisfaction of insurance liability where the estimated damage as per the bank was Rs.3,00,000/-. If the intimation of such settlement or fixing the compensation at Rs.50,000/- was given to the appellant, he would have been in a position to contest it, fight it or challenge it. But he has been deprived of that right.

6. In these circumstances, the judgment of the trial Court, so far as it relates to fixing of liability upon the guarantor, therefore, cannot be up-held. Incidentally it may be mentioned that the counsel for the appellant has pointed out to me from the operative part of the order that the trial Court was convinced about innocence of the appellant in the present case because in the operative part while passing a decree in favour of the bank the trial Court did not pass joint and several decree against both defendant No.1 as original borrower and the

present appellant as guarantor. But as per para 3 of the operative part, the bank was directed to make atmost effort to recover the amount from the defendant No.1 (Respondent No.2-owner) and as a last resort to make attempt to recover the amount from the defendant No.2 (the present appellant). It is, therefore, clear that the decree against the present appellant cannot be sustained. Hence I pass the following order :-

:ORDER:

The appeal is allowed.

Decree, so far as it relates to the present appellant, is set aside and, the claim of the plaintiff-bank against the present appellant is dismissed with costs.

[D.G.DESHPANDE]

12/01/2005 JUDGE.